# *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*

## ARBITRATION ON THE "REASONABLE PERIOD OF TIME"

## Submission of the United States

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## I. INTRODUCTION

1. Pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Japan has requested arbitration to determine the "reasonable period of time" for the United States to implement the recommendations and rulings of the Dispute Settlement Body ("DSB"), adopted August 23, 2001, in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan.* After the DSB adopted its recommendations and rulings on August 23, the United States stated its intention to implement them in a manner consistent with its WTO obligations and engaged in discussions with Japan pursuant to Article 21.3(b) in an effort to reach agreement on the reasonable period of time for U.S. implementation. These attempts failed to produce an agreement.

2. Implementation of the decisions of the panel and the Appellate Body will entail a multifaceted process that may include extensive consultations with Congress, legislative action, internal analysis and revision of certain policies and practices, and a recalculation of the dumping margins. As detailed further below, the United States intends to implement the recommendations and rulings of the DSB as promptly as it can, but anticipates that implementation will require 18 months – 14 months for any legislation, allowing for the completion of a full legislative session, plus four months to apply any legislation with respect to the determination in the Hot-Rolled Steel investigation.

3. This reasonable period of time is based on the specific circumstances of this dispute, as will be detailed further below. As a reference point, however, the United States notes that in previous arbitrated disputes involving legislation alone, the reasonable period of time has ranged from 10 to 15 months.[1] In previous arbitrated disputes involving administrative or regulatory

[1] *Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages")*, Award of the Arbitrator, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997 (15 months); *European Communities – Regime for the Importation, Sale and Distribution of Banana Regime ("EC – Banana Regime")*, Award of the Arbitrator, WT/DS27/15, 7 January 1998 (15 1/4 months); *EC - Measures Concerning Meat and Meat Products (Hormones) ("EC - Hormones")*, Award of the Arbitrator, WT/DS26/15, WT/DS48/13, 29 May 1998 (15 months); *Korea - Taxes on Alcoholic Beverages ("Korea -*

measures alone, the reasonable period of time has ranged from 6 to 12 ½ months.[2] Given this history and the fact that, in this dispute, the United States may have to take legislative then administrative actions sequentially and given that any legislation will require 14 months, a total implementation period of 18 months is reasonable. This allows only four months for the administrative implementation, two months less than any arbitrator's award for an administrative measure.

## II. EIGHTEEN MONTHS IS A REASONABLE PERIOD OF TIME IN LIGHT OF THE CIRCUMSTANCES OF THIS DISPUTE

### A. The WTO Legal Framework

4. The arbitrator's role under Article 21.3 of the DSU is limited to determining the reasonable period of time a Member has to implement the recommendations and rulings of the DSB. In making this determination, the arbitrator should examine the particular circumstances which make it impracticable for the Member to implement immediately.

5. The most direct guidance for the arbitrator is found in Article 21.3(c), which provides as a guideline that the reasonable period of time "should not exceed 15 months from the date of the adoption of a panel or Appellate Body report." However, "that time may be shorter or longer, depending upon the particular circumstances."

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*Alcoholic Beverages")*, WT/DS75/16, WT/DS84/14, 4 June 1999 (11 ½ months); *Chile – Taxes on Alcoholic Beverages*, Award of the Arbitrator, WT/DS87/15, WT/DS110/14, 23 May 2000 (over 14 months); *United States – Section 110(5) of US Copyright Act*, Award of the Arbitrator, WT/DS160/12, 15 January 2001 (12 months); *Canada – Term of Patent Protection*, Award of the Arbitrator, WT/DS170/10, 28 February 2001 (10 months); *United States – Anti-Dumping Act of 1916*, Award of the Arbitrator, WT/DS136/11, WT/DS162/14, 28 February 2001 (10 months).

[2] *Indonesia – Certain Measures Affecting the Automotive Industry*, WT/DS54/16, WT/DS55/15, WT/DS59/14, WT/DS64/13, 4 December 1998 (12 months); *Australia – Import Ban on Salmon*, WT/DS18/9, 23 February 1999 (8 months); *Canada – Patent Protection of Pharmaceutical Products* (*Canada – Pharmaceuticals*), WT/DS114/13, 18 August 2000 (6 months); *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/12, WT/DS142/12, 4 October 2000 (8 months); *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/10, 31 August 2001 (12 ½ months).

6. The particular circumstances relevant to the arbitrator's determination of the reasonable period of time are: the legal form of implementation (legislative or regulatory), the technical complexity of the necessary (legislative or regulatory) measures the Member must draft, adopt and implement, and the period of time in which the implementing Member can achieve the proposed legal form of implementation in accordance with its system of government.[3]

7. In this dispute, both the legal forms of implementation and the technical complexity of the necessary measures require a "reasonable period of time" in excess of 15 months. With respect to the legal forms of implementation, while previous disputes presented for arbitration under Article 21.3 involved either legislation or regulatory/administrative measures (or legislation and implementing regulations promulgated simultaneously), this dispute involves two separate recommendations of the DSB concerning (1) legislation, and (2) administrative determinations made pursuant to that legislation. Moreover, with respect to the technical complexity of the necessary measure, this is not a case in which simple repeal of a statutory provision is at issue. Rather, the Appellate Body found that certain calculation methods, one provided for in the U.S. statute, was contrary to the obligations in the Anti-Dumping Agreement. No one contests in this dispute that some calculation method is appropriate; the issue is what that method should be, a decision that requires considerable legal and technical analysis.

8. Furthermore, as the arbitrator in *Korea – Alcoholic Beverages* determined, "although the reasonable period of time should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB, this does not require a Member, in my view, to utilize an *extraordinary* legislative procedure, rather than the *normal* legislative procedure, in every case."[4] In that case, the arbitrator found that it was reasonable for Korea to follow its normal legislative procedure - - the next regular session of the national

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[3] *Japan- Alcoholic Beverages*, Award of the Arbitrator, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, para. 12.

[4] *Korea – Alcoholic Beverages*, para 42.

Assembly - - for the consideration and adoption of implementing legislation, even if that legislation could have been submitted during an extraordinary session.

9. Applying these standards, the arbitrator should conclude that eighteen months is a reasonable period of time, as detailed further below.

### B. The "Reasonable Period of Time" is Dictated in this Dispute by the Need to Combine Different Forms of Implementation.

10. In this dispute, the panel and the Appellate Body found that the final determination in the Hot-Rolled Steel investigation was inconsistent with the WTO Anti-Dumping Agreement in several respects, one of which involved a statutory provision. This is significant because, as several arbitrators have acknowledged, amendments to legislation generally take longer than administrative or regulatory amendments.[5] Therefore, the reasonable period of time to implement the recommendations and rulings of the DSB should include the 14-month period it would take to pass any necessary legislative amendments.[6]

11. First, the United States must be given sufficient time to secure the enactment of any necessary legislation. Only then will it have a basis to proceed with an amendment of the final determination in the Hot-Rolled Steel antidumping investigation. The statutory provision at

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[5] *See, e.g., Canada – Pharmaceuticals*, para 52 ("[I]f implementation is by *administrative* means, such as through a regulation, then the "reasonable period of time" will normally be shorter than for implementation through *legislative* means. It seems reasonable to assume, unless proven otherwise due to unusual circumstances in a given case, that regulations can be changed more quickly than statutes.")

[6] As discussed above, the arbitrator's role under Article 21.3 of the DSU is limited to determining the reasonable period of time a Member has to implement the recommendations and rulings of the DSB. As past arbitrators have found, the specific means of implementation are not within the jurisdiction of an arbitrator under Article 21.3(c); the sole concern of the arbitrator is the reasonable period of time: the "when", not the "what". *See, e.g., Korea – Alcoholic Beverages; Canada – Pharmaceuticals*, paras. 43 - 46. In this dispute, the Appellate Body found part of the U.S. antidumping statute to be inconsistent with the Anti-Dumping Agreement. Therefore, the reasonable period of time should include at least the time needed for a legislative amendment, plus the time needed to give effect to that legislation in the Hot-Rolled Steel antidumping investigation.

issue concerns the calculation of the so-called "all others" dumping margin – that is, the rate of dumping duty that is imposed on companies that were not investigated. The statute provides that the "all others" rate is the average dumping rate of the companies that were investigated, excluding only those companies whose margins were *de minimis* or were based entirely on "facts available"– i.e., under the U.S. statute, the "all others" rate can be based on company dumping margins based in part on facts available. The Appellate Body found that the Anti-Dumping Agreement "requires the *exclusion* of all such margins from the calculation of the maximum 'all others' rate."[7] The Appellate Body also found that the "all others" rate calculated in the Hot-Rolled Steel antidumping investigation was inconsistent with the Anti-Dumping Agreement because it was based on the calculation method in the statute.[8]

12. To implement the DSB's ruling concerning the "all others" rate in the Hot-Rolled Steel antidumping investigation, therefore, the U.S. administering authority must apply a new calculation method for the "all others" rate. But the U.S. administering authority cannot apply the new calculation methodology to determine the "all others" rate in the Hot-Rolled Steel antidumping investigation until it knows what that new methodology is. As Japan itself has indicated, the new methodology could be quite complicated, for instance, possibly requiring the elimination of all "facts available" from the individual company margins, and a recalculation of "all others" on the basis of what remains.[9] For this reason, and because of U.S. legal requirements connected with issuing an amended antidumping duty determination – detailed further below – an additional 4 months after any legislation will be necessary to issue an amended final determination in the Hot-Rolled Steel investigation.[10]

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[7] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("Appellate Body Report"), WT/DS184, adopted August 23, 3001, para. 128.

[8] Appellate Body Report, para. 129.

[9] Appellate Body Report, fn. 83.

[10] There are other recommendations and rulings to be implemented, but these all relate to administrative actions that are being undertaken now, and can be substantially completed within the time it will take to make any necessary legislative changes. For instance, the Appellate Body found that

## C. Fourteen Months Would Be Required For Any Legislative Changes.

### 1. Fourteen Months Is Reasonable In Light Of The U.S. Legal System And Prior Experience.

13. The DSB adopted the recommendations and rulings of the panel and Appellate Body in this dispute on August 23, 2001. On September 10, 2001, the United States stated its intentions to implement the recommendations and rulings in a manner consistent with its WTO obligations. Since then, the U.S. Executive branch has been consulting with the U.S. Congress and domestic stakeholders, as required by U.S. law, and has been undertaking internal deliberations to determine how best to implement the recommendations and rulings. In particular, the United States has been working conscientiously since adoption to develop various implementation options to use in the necessary consultations with Congress and the private sector.

14. Implementation raises complicated practical and legal issues. For example, the Department of Commerce has been preparing and analyzing options to respond to the Appellate Body's findings on the "arm's length" test, which will soon be the subject of detailed consultations with Congress and the private sector.[11] With respect to another finding, the Appellate Body noted U.S. concerns that the panel's reading of the obligations with respect to the "all others" rate would make it impractical to calculate such a rate.[12] In response, the

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excluding home market sales on the basis of the "99.5 percent" or arm's length test was inconsistent with the Anti-Dumping Agreement. Appellate Body Report, para. 240(d). To the extent that this will necessitate a change in agency practice, Section 123 of the Uruguay Round Agreements Act requires consultations with Congress and with private sector advisory committees, the publication of any proposed modification in the *Federal Register* for public comment, and final consultations with the Congress on the proposed modification. The change may not be implemented until 60 days after these final consultations. Exhibit 1. At this point, the Department of Commerce is preparing various options for purposes of consultations, but has not yet published any proposals in the *Federal Register*. The United States is not seeking a longer reasonable period of time to accommodate these actions. However, as noted below, these actions will mean that the redetermination after legislation is passed will be more complicated.

[11] *See* preceding note.

[12] Appellate Body Report, para. 124.

Appellate Body acknowledged that the Anti-Dumping Agreement created a lacuna that must be overcome in some manner, but did not decide how it could be overcome, only noting that various options had been suggested by the parties. It has now been up to the United States to develop a method that both overcomes the lacuna, is consistent with the Anti-Dumping Agreement, and is workable. While necessary deliberations and consultations have been on-going since adoption, it is apparent that, if there is to be legislation to implement the DSB rulings with respect to the "all others" rate, 14 months will be required to enact such legislation.

15. As discussed in detail further below, the U.S. legislative process is a complex, nuanced procedure. Based on the historical statistical trends, documented below, the large volume of legislation introduced in every Congress, and the myriad points of uncertainty inherent in the U.S. legislative process, it is unlikely that any proposed implementing legislation would be enacted earlier than the end of the up-coming second session of the 107th Congress, which will begin later this month and will likely end in October.[13] And before any such legislation is proposed, the U.S. administering authority must review various options for implementation, consult with Congress and the U.S. domestic stakeholders, and put out a federal register notice soliciting public comments on the proposed approach. Fourteen months is a conservative estimate of the time necessary for legislation alone, which would roughly correspond to the end of the second session of the 107th Congress – when the likelihood of enactment of implementing legislation would be the greatest.

16. A period of 14 months for legislation alone is also consistent with previous arbitration awards under Article 21.3(c) involving legislation. The first arbitration on the reasonable period of time required for a legislative measure implementing the DSB's recommendations and rulings was *Japan - Alcoholic Beverages*, in which Japan requested as much as 5 years to amend certain

[13] Because of elections, the second session of Congress generally adjourns in October, although later adjournment is possible. *See* Exhibit 2.

provisions of its liquor tax laws, and 23 months to amend others.[14] The arbitrator concluded that the 15-month guideline was justified and that the EC and the United States had not demonstrated particular circumstances to justify a shorter time frame.[15]

17. Similarly, in the award issued in *EC – Banana Regime,*[16] the arbitrator gave the EC 15 months and one week to implement the DSB's rulings and recommendations. The EC requested a reasonable period of time of 15 months and one week because, according to the EC, amending the EC import regime for bananas was going to be a "difficult and complex task for a number of reasons,"[17] including the controversy among domestic political constituencies over implementation. The United States and the other complaining parties proposed 9 months as the reasonable period of time, arguing that the EC's legislative process did not require 15 months and that domestic political considerations did not form part of the examination of the shortest period of time within which implementation could be accomplished.[18] The arbitrator concluded that the arguments of the complaining parties, that there were particular circumstances that justified ignoring the 15-month guideline, were not persuasive given the complexity of the implementation process as outlined by the EC.[19] In that arbitration, the arbitrator awarded the EC 15 months and one week – focusing on the reasonable date by which the EC implementation process could be concluded, rather than on an arbitrary period of time.[20]

18. In *EC - Hormones*, the EC requested a total of 39 to 40 months, including 15 months for

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[14] Para. 8.

[15] *Id.* para. 27. In that case, the EC argued for a reasonable period of time of 15 months (para. 25).

[16] Award of the Arbitrator, WT/DS27/15, 7 January 1998, para. 18.

[17] *Id*. para. 5.

[18] *Id.* paras. 14 and 15.

[19] *Id*. para. 19.

[20] *Id*. paras. 19-20.

legislative action, to implement the recommendations and rulings of the DSB.[21] The United States and Canada proposed, based on their understanding of the EC's legislative procedures, that 10 months were all that were necessary to implement complying legislation.[22] The arbitrator was not convinced by U.S. and Canadian arguments that the proposed legal form of implementation (and indeed the particular legislative option) could be accomplished in a shorter time frame than the EC's proposal of 15 months.[23] Likewise, in this case, it is not for Japan to determine what type of legislative option the United States should choose, and that a "less" complex option could be accomplished in less than the 15-month guideline.

19. Finally, the disputes *United States – 1916 Act* and *United States – Section 110*, both of which involved changes to U.S. statutes, are instructive. In both of those disputes, the United States explained in great detail that the complex and time-consuming U.S. legislative process was such that the United States required until the end of the Congressional session, to allow passage of any legislation. The arbitrators, noting the theoretical flexibility of the U.S. Congress in scheduling its work and the lack of compulsory minimum time limits, set the end of the "reasonable period of time" at 10 months, in the case of *United States – 1916 Act*, and 12 months, in the case of *United States – Section 110*, in both cases setting the deadline at the end of July 2001, well before the end of the Congressional session. In both cases the DSB decided to extend the reasonable period of time until the end of the Congressional session.[24] Similarly, in *United States - Tax Treatment for "Foreign Sales Corporations"* the time-period established for the enactment of legislation was before the end of the Congressional session, and again the DSB

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[21] Paras. 5 and 12. The EC first requested 40 months, then changed that to 39 months to complete a risk assessment study. Likewise the EC had first proposed 2 years to implement its legislative measure. *Id.* para. 13.

[22] *Id.* paras. 15, 18, 19.

[23] *Id.* para. 48, *see also* paras. 44-47.

[24] Although Congress was not able to enact legislation by the end of the session, at the time the DSB decided upon the extension no one could have foreseen the extraordinary events of this past fall, which would consume much of Congress's time at the end of the session.

agreed to extend the period to more closely align with the end of the Congressional session.

20. In the section that follows, the United States describes its legislative process, and presents empirical information showing it is reasonable to include in the reasonable period of time a 14-month period – until the anticipated end of this session of Congress – to enact legislation.

### 2. The United States Legislative Process

21. Under the United States system of constitutional government any changes in national law must be enacted by the U.S. Congress, which sets its own procedures and timetable. The Executive branch of the U.S. Government has no control over these procedures and timetable. Securing the enactment of legislation in the U.S. Congress is a complex and lengthy process. Moreover, only a small fraction of the thousands of bills introduced in each Congress ever become law and, more importantly, the bulk of those that are approved are not acted upon until the closing weeks of a Congressional session, demonstrating that the process of obtaining the votes necessary to enact legislation is both difficult and time-consuming. Viewed in this light, the U.S. position that this process will take 14 months is reasonable. This would allow for a full legislative session to secure enactment of legislation and is clearly part of a "reasonable period of time." To provide less time would be unreasonable and would not facilitate a positive resolution of this dispute.

### i. Procedures for Introduction and Consideration of Legislation in the U.S. Congress

22. The power to legislate is vested in the United States Congress, which has two chambers, the House of Representatives and the Senate. Both chambers must approve all legislation in identical form, before it is sent to the President of the United States for signature or other action.[25] Only after presidential approval does proposed legislation become law.[26] Proposed legislation that will become public law usually takes the form of a "bill". From the time that a bill is introduced in Congress to the time that it is approved by both chambers, it will have passed through at least ten steps.[27] Most bills that are introduced do not survive this process to become law, and those that do are likely to have been significantly amended along the way. What follows is an abbreviated discussion of the steps involved in enacting legislation in the U.S. Congress.

23. The first step in the legislative process is for a bill to be introduced in the House of Representatives ("the House") or the Senate by a member of Congress. With regard to legislation initiated by the Executive branch, it may transmit proposed draft legislation to the Speaker of the House of Representatives or the President of the Senate and the draft legislation will then typically be introduced in either its original or revised version by the chairman of the committee or ranking member of the committee with subject matter jurisdiction over the bill. Alternatively, the Executive branch may request that an individual member or members introduce proposed legislation.

24. After introduction, as a general rule, bills are referred to a standing committee or

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[25] See generally, *The Constitution of the United States*, Article I, Section 1 and Section 7 (Exhibit 3); *How Our Laws are Made*, Charles W. Johnson, 2000 at 42 (Exhibit 4).

[26] *Id*.

[27] The flowchart at Exhibit 5 presents a general overview of the process.

committees having jurisdiction over the subject matter of the bills.[28] These committees may also refer the proposed legislation to various subcommittees.[29] In the House, a bill may be referred to a number of committees,[30] while in the Senate a bill is more commonly referred to the committee with primary subject matter jurisdiction and then may be sequentially referred to other committees.[31]

25. Committee action is the key to the life of a proposed bill, since most bills "die" in committee, as a result of inaction. For those bills that survive, this is where the most intense consideration of their merits is given. Most bills are referred by the committee with jurisdiction to a subcommittee for consideration. Normally, the subcommittee schedules public hearings to hear from proponents and opponents of a bill, including government agencies, experts, interested organizations and individuals.[32] Testimony is generally based on a written statement that will later be included in a committee report. There is no specified time frame for committee consideration, although the Speaker of the House will generally place time limits on a second committee's consideration of a bill at his or her discretion.[33]

26. The next step in the process is the "mark-up". When the hearings are completed, the subcommittee usually meets to "mark-up" the bill – make changes and amendments prior to deciding whether to recommend the bill to the full committee. If the subcommittee votes to

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[28] There are 19 committees in the House and 16 in the Senate (*see* Exhibit 6). These committees process and manage the thousands of bills that are introduced in each Congress every two years. Committees are chaired by a member of the majority political party in the relevant chamber. There is also a "ranking minority member," a member of the other political party, who leads the minority party members on a committee.

[29] There are approximately 200 subcommittees.

[30] This description, in the interest of economy, assumes that, like most bills, draft legislation would originate in the House and then move to the Senate to receive separate consideration.

[31] Johnson, at 5 (Exhibit 4).

[32] *Id.* at 12.

[33] *Id.* at 10.

recommend, it is called "reporting". The subcommittee may also suggest that a bill be "tabled" or postponed indefinitely.[34] The House has a complicated "germaneness" rule which, in principle, requires that an amendment relate to the subject matter under consideration, have a relevant fundamental purpose to that of the bill, and be within the jurisdiction of a bill.[35] Nevertheless, once these basic factors are met, bills or amendments to bills can move together even if they have little else in common. In essence, a bill can become a magnet for amendments in committee, slowing down a bill's progress.

27. After receiving the subcommittee's report (recommendation), the full committee may conduct further study and hearings. There will again be a markup process. The full committee then votes whether to report the bill, either as originally introduced without amendment, or as revised, to the full House.[36] Once again, the bill may be tabled, or no action may be taken on it. If the full committee votes to report a bill to the House, a committee report is written by the committee's staff. The report supports the committee's recommendation and is generally a section-by-section analysis that describes the scope and purpose of the bill, impact on existing laws and programs, the position of the executive branch, and amendments made by the committee.[37] Committee reports also include dissenting views and can be supplemented by any committee member. An approved bill is therefore "reported back" to the house.

28. The timing of consideration of legislation on the House floor is determined as a general rule by the Speaker of the House and the majority [political party] leader, who may place the bill on the Calendar for House debate. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be offered. The Rules Committee recommends a rule which takes the form of a House resolution which is

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[34] *Id.* at 13.

[35] *Congressional Deskbook 2000*, Michael L. Koempel and Judy Schneider, The Capitol.Net Inc. at 263 (Exhibit 7).

[36] *Id.* at 14. A "clean bill" receives a bill number.

[37] *Id.*

debated and voted on before the House considers the bill on its merits.[38] During the debate process, there is opportunity for members of Congress to offer further amendments.[39] After voting on amendments, the House immediately votes on the bill itself with any adopted amendments.[40] The bill can also be returned to the committee that reported it. If passed, the bill must be referred to the Senate, which may or may not have concurrent pending legislation.

29. The Senate, following its own legislative process and consideration, may approve the bill as received, reject it, ignore it or change it. While the Senate has similar procedures for consideration of legislation by relevant committees, there are significant differences in the way the Senate considers proposed legislation. The Senate functions in a less rule-driven manner than the House, and scheduling and floor consideration is generally decided by consensus.[41] Unlike the House, where debate is strictly controlled, in the Senate debate is rarely restricted. The Senate does not have a Rules Committee to govern floor consideration. Rather, there are complex rules mandating unanimous consent for Senate floor consideration.[42] In addition, because of the privileges accorded to Senators, an individual Senator may "filibuster" (hold the floor and speak for a very long period of time),[43] or place a "hold" on legislation which can prevent it from being considered.[44] Filibusters can only be ended by a "cloture" procedure, a rule that requires the vote of sixty senators, which is very difficult to achieve. The other major difference between the House and the Senate is that an amendment in the Senate generally does

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[38] Johnson, Exhibit 4 at 19.

[39] *Id.* at 25.

[40] *Id.*

[41] *Congressional Deskbook 2000* at 267 (Exhibit 7).

[42] *Id.*

[43] *Id.* at 274 - 279. *See also Congress and its Members,* Roger H. Davidson and Walter J. Oleszek, CQ Press (1997) at 251-255 (Exhibit 8).

[44] *Id.*

not have to be "germane," i.e., relevant to the bill to which it is attached.[45]

30. Most bills are unlikely to be passed by the Senate exactly as referred by the House. The Senate may amend a bill or pass its own similar legislation. Therefore, a conference committee is organized to reconcile differences between the House and Senate versions. Conference committee members are appointed by each Chamber and given specific instructions, which may be revised every 21 days.[46] If the conference committee cannot reach agreement, the bill dies. If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes.[47] The conference report must be approved by both chambers, in identical form, or the revised legislation dies. After the bill proposed by the conference committee is approved by both chambers, it can be sent to the President for approval.[48]

### ii. The Timetable for Consideration of Legislation in the U.S. Congress

31. The other central factor that determines when a bill becomes law is the Congressional schedule. The Constitution mandates only that Congress meet "at least once in every year"[49] and that it convene on January 3rd, unless another date is chosen.[50] A Congress lasts two years, and meets in two sessions of one year each, beginning in January. The adjournment date varies, largely depending on whether it is an election year. In an election year, Congress may adjourn in

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[45] *Id. See also Congressional Deskbook* at 280. Amendments that are not germane are often called "riders."

[46] Johnson, Exhibit 4, at 36. House conferees are usually supporters of the House legislation, and members of the committee with jurisdiction over the bill. Senate conferees may be from either party and are chosen by unanimous consent.

[47] *See generally* Johnson at 35-38-40 and *The Legislative Process*, C-Span.org (Exhibit 9).

[48] *Id.*

[49] *U.S. Constitution*, Article I, Section 4 (Exhibit 3).

[50] *Id.*, 20th Amendment.

October, but in a non-election year it is typical for Congress to adjourn in November or December. [51] Moreover, Congress is not usually continuously "at work" during a session. Because of intricate schedules and calendars, as well as recesses, Congress is often only present and in session 3 days a week, 3 weeks per month and is in recess for the month of August.[52] Accordingly, the earliest date a bill can be introduced is January and if it is not acted upon before adjournment, it will die at the end of the Congress.

32. The length of time required for a bill to move through this complex process is a result not only of the numerous stages in the process and lack of well-defined timetables for these stages, but also of the large volume of legislation that is proposed by members. Moreover, at almost every step of the process, especially in the Senate, members have the ability to control the progress - or seek additional time for consideration - of even non-complex legislation.

33. Moreover, most bills that do become law are not acted on until the last weeks or months of the legislative session. For example, looking at the first session of the 106th Congress reveals that the overwhelming preponderance of the bills which became public law were enacted during the final weeks of the Congressional session. (*See* Exhibit 10). Specifically in the trade area, 15 of the last 22 major trade bills enacted over the past 25 years were passed toward the end of a Congressional session. (*See* Exhibit 11).

34. What these illustrations and statistics show is that it is reasonable to expect that any legislation introduced in the second session of the 107th Congress, which begins in January 2002, will take the better part of a full legislative session – if not longer – to become law.

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[51] *See* Exhibit 2.

[52] *See Congressional Deskbook,* at 242-243 (Exhibit 7).

### D. Following Any Legislative Changes, Four Additional Months Will Be Necessary to Complete the Implementation of the DSB's Recommendations and Rulings.

35. The previous section showed that 14 months is reasonable to pass any legislative amendments that may be necessary to change the method for calculating the "all others" rate. It is only after any revised method for calculating the "all others" rate is decided upon that the specific calculation in the Hot-Rolled Steel antidumping investigation – which the Appellate Body also found inconsistent with the Anti-Dumping Agreement – can be amended consistent with that revised method.

36. Although, as discussed above, the Executive branch of the U.S. government has no control over the legislative procedures or timetable, it has more control, within practical and legal limits, over issuing a revised determination pursuant to legislation. In view of the importance of expeditious implementation, therefore, the United States undertakes to issue a redetermination only four months after any necessary legislative changes. This is two months shorter that the shortest period of time ever awarded in an arbitration for administrative/regulatory changes.[53]

37. One of the legal requirements that the United States must meet in issuing any redetermination in this case is section 129(d) of the Uruguay Round Agreements Act ("URAA"), which requires that interested parties – *e.g.*, the U.S. petitioning industry and the Japanese respondents – be given an opportunity to provide written comments on the redetermination.[54] In appropriate cases, a hearing may be held with respect to the determination.

38. Therefore, following the enactment of any legislation, the United States must calculate and produce a draft redetermination to provide to interested parties for comment under section 129(d) of the URAA. Although many aspects of this redetermination will have been prepared prior to the enactment of any legislation – indeed, much of the work has been on-going since

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[53] *See* note 2, *above*.

[54] Exhibit 12.

adoption – the "all others" portion of the redetermination cannot be calculated until the new calculation method is established. Although it is not clear exactly what any final "all others" calculation method will be, Japan suggested in this proceeding that the United States might address the "all others" issue by going through each company's sales and cost data to remove all "facts available" in order to calculate a different margin for that company for the sole purpose of calculating the "all others" rate.[55] Thus, as even Japan has implicitly recognized, the recalculation may be complex and time-consuming.

39. Therefore, to recalculate the "all others" margin and make a draft redetermination available to interested parties would require at least 30 days following the establishment of any new method of calculating the "all others" rate of antidumping duties. This is not a legal minimum, but is a practical minimum in light of the work required to complete the recalculations.

40. With respect to the amount of time necessary under section 129(d) of the URAA to allow interested parties an opportunity to comment on the redetermination, it is important to note that the redetermination will include not only a recalculation of the "all others" rate, but also, among other things, a substantial recalculation of the antidumping duty margins of the investigated companies. The application of a new "arm's length" test – also resulting from this dispute – will likely result in different sales being included in the home market databases for all examined companies. The new databases will have to be tested for below-cost sales and adjusted, and there may be significant changes in the home market sales selected as "matches" for the U.S. sales. NSC's and NKK's theoretical weight sales will have to be adjusted based on their late-submitted weight factor data and KSC's sales through CSI will have to be assigned an appropriate non-adverse facts-available margin before they are incorporated into the amended margin-calculation program. Thus, significant analysis involving enormous quantities of data and complex computer program algorithms would be needed to amend the margins of all three examined companies, in addition to the processes required to address the "all others" margin.

[55] Appellate Body Report, f.n. 83.

41. Because the changes associated with this dispute will affect the calculations for every company to which the order applies, the redetermination will be, in various respects, an entirely new decision. The Anti-Dumping Agreement contains a number of "due process" and transparency obligations that should therefore be taken into account in determining the amount of time required to issue this redetermination. For example, Article 6.2 of the Anti-Dumping Agreement requires that "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defense of their interests." Article 6.2 requires national authorities, upon request, to "provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered." Interested parties also have a right, upon justification, to present other information orally. Article 6.4 provides for "timely opportunities" for interested parties to see information relevant to their cases and to prepare presentations based on that information. Article 12 requires public notices and reports of final determinations that sufficiently detail the "findings and conclusions reached on all issues of fact and law considered material."

42. These important due process safeguards in the Anti-Dumping Agreement are no less significant in the context of a redetermination based on DSB recommendations and rulings, and the arbitrator's award should respect these safeguards, as reflected in U.S. law and regulation. In addition, antidumping duty calculations are complex and data-intensive exercises, and both interested parties and the Commerce Department require sufficient time and procedures to ensure both that the calculations are performed accurately, and that the requirements of the Anti-Dumping Agreement are satisfied. Under U.S. law, 140 days are allowed between initiation of an investigation and the preliminary determination, and 75 days are allowed between the preliminary and the final determination.[56] Article 7.4 of the Anti-Dumping Agreement suggests that even 120 days, or four months, between the preliminary and final determinations is a short period in this context. It provides that the provisional measures resulting from a preliminary

[56] Sections 733(b) and 735(a)(1) of the Tariff Act of 1930, as amended (the "Act"). Exhibit 13. These deadlines can be extended, to 190 days and 120 days, respectively, in the case of complicated cases. Sections 733(c) and 735(a)(2) of the Act. Exhibit 13. The deadlines of many investigations are extended.

determination "shall be limited to as short a period as possible, not exceeding four months".

43. Reflecting the requirements of the Anti-Dumping Agreement, Commerce Department regulations provide that parties shall have 50 days from the publication of a preliminary determination in which to submit their written comments on the determination. 19 CFR 351.309(c).[57] In general, however, this period is extended because the statutory period for making a final determination is normally extended.[58] This is followed by rebuttal comments and, if requested, a hearing.[59] A final determination, under section 735(a)(1) of the Tariff Act of 1930, as amended, is made 75 days after the preliminary determination. This time is necessary to consider the comments of the parties, prepare a response to each, and incorporate any changes into the redetermination, as appropriate.

44. Because antidumping duty margin calculations are complex, after a final determination is issued, U.S. law provides for a period during which any clerical errors in the final determination are identified and corrected. Section 735(e) of the Act.[60] Under section 351.224(b) of the Commerce Department's regulations, the Department has five days from the public announcement of a final determination to disclose the calculations performed in connection with that determination to the parties. Under section 351.224(c)(2), the parties have five days from this disclosure to provide comments on what they believe to be clerical errors, and an additional five days to provide rebuttal comments. Section 351.224(e) provides that Commerce will normally issue an amended final determination correcting any ministerial errors within 30 days of the public announcement of the final determination. As a practical matter, however, these time limits are often extended, because of the amount of effort necessary for the parties and the Department of Commerce to review and, if necessary, correct the calculations.

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[57] Exhibit 14.

[58] Section 735(a)(1) of the Act provides for a period of 75 days between preliminary and final determinations. This period can be, and normally is, extended to 135 days.

[59] Sections 351.309(d) and 351.310 of the Commerce Department regulations, Exhibit 14.

[60] Exhibit 13.

45. In light of the requirements of the Anti-Dumping Agreement and U.S. law and regulation and the particular circumstances of this case where much work can be done prior to the enactment of any legislation, the United States submits that it will require a minimum of 30 days following any legislation to make a "preliminary" redetermination available to the parties (compared to 140 days for a preliminary determination in a normal investigation), a further 30 days to provide an opportunity for interested parties to provide comments (compared to 50 days for a normal investigation), 30 days to produce a final redetermination (including rebuttal comments, a hearing, and consideration of comments and views in the final determination)(a total time of 60 days from "preliminary" to "final" determination, compared to 75 days in a normal investigation), and a final 30 days to make any necessary corrections (the same as in a normal investigation). This is a total of 120 days, or four months.

46. As should be clear, this four-month period calls for a very ambitious schedule. Indeed, as noted, it is two months shorter than the shortest reasonable period of time ever awarded in an arbitration for administrative/regulatory changes. Nevertheless, the United States considers it important that implementation proceed as expeditiously as practicable, and undertakes to complete the process within this short time frame.

## VI. CONCLUSION

47. In sum, implementing the recommendations and rulings of the DSB in this dispute will require 14 months for any legislation, followed by four months to incorporate these and other changes into the determination in the Hot-Rolled Steel antidumping investigation.

48. The United States therefore requests that the arbitrator determine that 18 months is a reasonable period of time in which to implement the DSB's rulings and recommendations under Article 23.1 of the DSU.